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No. 07-1438

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

WESTBOUND RECORDS, INC.,
Petitioner,

v.

JUSTIN COMBS PUBLISHING, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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July 8, 2008

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QUESTIONS PRESENTED

I. Whether a presumption of validity for punitive-damages awards within a single-digit ratio of compensatory awards, with exceptions only if the verdict is based on passion and prejudice or no malice is found, is inappropriate because such presumption fails to consider the guideposts established by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), such as the level of reprehensibility, the size of the compensatory-damages award and whether the compensatory-damages award includes a punitive component.

II. Whether Petitioner failed to show a conflict among appellate courts' application of the *Gore* guideposts.

III. Whether the Sixth Circuit correctly applied each *Gore* guidepost in reversing the District Court's award of punitive damages and remanding for a remittitur of the punitive-damages award to a punitive/compensatory ratio of 1:1 or 2:1.

IV. Whether the Sixth Circuit correctly applied a *de novo* standard of review in considering the *Gore* guideposts, assuming the jury accepted Petitioner's factual view of the case and applying the guideposts to such evidence.

V. Whether repeated conduct for purposes of applying the "reprehensibility" guidepost is limited to conduct against third parties, because, as this Court held in *Philip Morris USA v. Williams*, 549

U.S. 346 (2007), such conduct also may pose a substantial risk to the general public.

RULE 29.6 STATEMENT

Respondent Bad Boy Entertainment, Inc. has no parent company, and there are no publicly held companies that own any stock of Bad Boy Entertainment, Inc.

Respondent Bad Boy Records LLC has no parent company, and there are no publicly held companies that own any stock of Bad Boy Records LLC.

Respondent Janice Combs Publishing, Inc. d/b/a Justin Combs Publishing has no parent company, and there are no publicly held companies that own any stock of Janice Combs Publishing, Inc. d/b/a Justin Combs Publishing.

UMG Recordings, Inc. is a wholly owned subsidiary of Vivendi Universal, a publicly traded company.

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STATEMENT OF THE CASE

This case is not the appropriate vehicle to revisit punitive-damages jurisprudence. No circuit split exists. Instead, Petitioner, Westbound Records, Inc. ("Westbound"), is simply dissatisfied with the Sixth Circuit's decision reducing its unconstitutionally excessive punitive-damages award and seeks this Court's review of the Sixth Circuit's fact-specific decision.

Congress has determined that the maximum statutory damages for willful copyright infringement are $150,000. Yet, because of a narrow exception allowing punitive damages for common-law copyright infringement of sound recordings created before 1972, the jury awarded Westbound punitive damages of $3.5 million for a single infringed work.

The Sixth Circuit, after careful consideration of this Court's guideposts for review of punitive-damages awards set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), found the award unconstitutionally excessive and remanded to the District Court for a remittitur of the punitive-damages award to a more appropriate ratio of punitive to compensatory damages of 1:1 or 2:1.

The Sixth Circuit concluded that, at best, only a portion of one of the three *Gore* guideposts weighed in favor of a punitive-damages award in this case: a showing, albeit not strong, of willful copyright infringement. The Sixth Circuit determined that the remaining guideposts — including those factors this Court emphasized in reversing a punitive-damages

award in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003) — demonstrated that a $3.5 million punitive-damages award in this copyright infringement case was unconstitutionally excessive:

1. The compensatory-damages award is substantial and already includes a punitive component in allowing for the recovery of lost profits, which constitutes the majority of the award;

2. The harm inflicted was economic and not physical;

3. No evidence exists that Westbound is a financially vulnerable victim; and

4. No evidence of repeated misconduct exists.

Rarely citing to — and greatly exaggerating — the record, Westbound now complains that a recovery of punitive damages to compensatory damages in the range of 1:1 or 2:1, although more than twice the amount Congress has determined appropriate to punish willful copyright infringement, is insufficient. Westbound urges the Court to establish a presumption of validity for punitive-damages awards within a single-digit ratio of compensatory awards, with exceptions only if the verdict is based on passion and prejudice or where no malice is found.

Westbound has manufactured a split among appellate courts in how they apply the *Gore* guideposts, and, in particular, the second guidepost calling for consideration of the punitive-to-

compensatory ratio. In one camp, according to Westbound, courts "apparently" presume the validity of single-digit-ratio awards; in the other, courts reverse single-digit-ratio awards based on *de novo* review.

These cases did not apply the *Gore* guideposts differently. In each case, the court did not simply consider the punitive-compensatory ratio, but examined all three *Gore* guideposts in the context of the case-specific facts. The trend of the cases comports with this Court's suggestion in *Exxon Shipping Co. v. Baker*, 2008 U.S. Lexis 5263, **74-80 (2008), and *Campbell* that punitive-damages awards should be — and typically are — at the lower end of the single-digit spectrum when the level of reprehensibility is low or the other guideposts weigh against the plaintiff.

Likewise, here the Sixth Circuit did not "get bogged down" in examining the punitive-to-compensatory ratio, as Westbound contends, but, instead, thoroughly examined each guidepost in reaching its conclusion that the ratio was too high and reduced it to the range endorsed by this Court.

Indeed, a presumption of validity of a single-digit-ratio has never even been considered by this Court, and for good reason. As this Court has noted in its most recent opinions on punitive damages, high single-digit-ratio awards represent the upper limit of constitutional propriety only in the most exceptional cases; a 1:1 ratio is more appropriate in cases where, as here, the case for punitive damages is not strong. *See Baker*, 2008 U.S. Lexis 5263, **74-80; *Campbell*, 538 U.S. at 425.

The Sixth Circuit relied on precisely such considerations in determining that a 2:1 or 1:1 ratio is more appropriate here than the 9.5:1 ratio the jury awarded. Thus, this case, where Westbound has already been compensated with a substantial sum that includes a punitive component, demonstrates precisely why Westbound's "presumption of validity" proposal would not appropriately guard against punitive-damages awards that violate due process. Westbound's proposal fails to consider not only the facts of each individual case but also many of the indicia identified in *Gore* and *Campbell* that an award is unconstitutionally excessive.

Westbound also erroneously suggests that the Sixth Circuit applied a *de novo* standard of review to factual findings of the jury when such review should have been for clear error. The Sixth Circuit assumed the jury accepted Westbound's factual view of the case and applied the guideposts to such evidence.

Finally, Westbound suggests the appellate courts are split on whether repeated conduct for purposes of applying the "reprehensibility" guidepost includes conduct against the plaintiff or is limited to conduct against third parties. This Court clarified in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), that harm to others is the test because such conduct also may pose a substantial risk to the general public. In any event, Westbound has failed to provide any evidence of repeated misconduct against nonparties or itself, alleging only a single act of infringement.

This case was properly decided under the established precedent of this Court. Therefore, Westbound's Petition should be denied.

I. The Underlying Allegations

A. "Ready to Die" Is Produced and Released.[1]

Bridgeport Music, Inc. ("Bridgeport") owns the musical composition "Singing in the Morning," and its sister company Westbound owns the 1972 sound recording embodying that musical composition recorded by the Ohio Players. (R. 424, Trial Transcript Volume ("Tr.") IX, 1580, 1586.)

In 1994, Defendant Bad Boy Entertainment, Inc., as a joint-venturer with non-party Arista Records, Inc., released the album *Ready to Die*, recorded by the late rap artist Christopher Wallace, professionally known as "Notorious B.I.G." (R. 419, Tr. VII, 1037, 1166, 1169.) The album includes the sound recording "Ready to Die." (R. 370, Tr. Ex. 77.)

The recording "Ready to Die" was produced by non-party Osten Harvey, Jr.,[2] who admitted at his

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[1] Defendants reject, in large part, Westbound's recitation of the facts, which includes few, if any, citations to the record and generally repeats many of the inflammatory, exaggerated and unsupported allegations Westbound made at trial. To the extent relevant to the arguments herein, Defendants explain the basis for their disagreement within the text of their argument.

[2] Defendants filed a Third-Party Complaint against Harvey, but it was dismissed without prejudice for lack of personal

deposition that he included a sample of a small portion of the sound recording "Singing in the Morning" in "Ready to Die." He said he chose the work because it sounded like another sample he had originally used in "Ready to Die," which he could not license. (R. 378, Tr. II, 281; R. 399, Video Depo. of Osten Harvey Jr., pp. 18-20, 126-32.)

Defendants had no role in or knowledge of the placement or selection of this sample and did not have any control over Harvey's actions. (R. 419, Tr. VII, 1037-40, 1058-60, 1133, 1170, 1177; R. 370, 7/19/94 Wallace Correspondence, Tr. Ex. 507; R. 378, Tr. II, 281; R. 399, Video Depo. of Osten Harvey Jr., pp. 126-32.) Indeed, Defendants UMG Recordings, Inc. and Bad Boy Records LLC had no involvement with the *Ready to Die* album until more than a decade later. (R. 419, Tr. VII, 1206, 1210-15, 1228, 1271.)

Bad Boy Entertainment, Inc. and its principal, Sean Combs, who was the named "executive producer" of the album *Ready to Die* but who had no role in the actual production of the song, are well known for sampling lawfully other artists' music in creating their own music. (R. 419, Tr. VII, 1043, 1050-53, 1175-77.) For years, Combs has requested and received licenses to use hundreds of samples and is careful to do so because of his sampling reputation. (R. 419, Tr. VII, 1043; *see also id.* at 1050-53.) The album *Ready to Die* includes numerous authorized and credited samples.

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jurisdiction. (R. 44, Amended Third Party Complaint; R. 77, Amended Report and Recommendation; R. 104, Order.)

(R. 370, Tr. Exs. 557-558 (album liner notes); *see also* R. 419, Tr. VII, 1060-61.)

B. Bridgeport and Westbound Demand 25% of "Ready to Die."

In 1998, Bridgeport and Westbound sent letters — never addressed properly to reach Defendants — demanding 25% ownership of the copyright in "Ready to Die" in exchange for use of the "Singing in the Morning" sample. Bridgeport and Westbound never requested that Defendants cease exploiting the *Ready to Die* album, only that they agree to a fee for the continued use of the sample. (R. 370, Tr. Exs. 19A, 20B; R. 419, Tr. VII, 1046-47.) Defendants never received such a letter directly and continued to exploit the work. (R. 419, Tr. VII, 1045-46, 1176-77.)

C. Defendants Re-Release *Ready to Die* While Engaged with Bridgeport and Westbound in Settlement Discussions.

While Defendants were not allowed to introduce the evidence during the trial's liability phase, in an offer of proof, Defendants demonstrated that the parties had engaged in continuous settlement discussions during the pendency of the action, Defendants making numerous settlement offers. (R. 420, Tr. VIII-A, 1360.)

During these settlement discussions, in 2004, Bad Boy Records released re-mastered versions of *Ready to Die* through a distribution agreement with UMG Recordings, Inc. Neither Bridgeport nor Westbound ever sought to enjoin this re-release during the pendency of the trial, instead simply relying on their

request for a permanent injunction to be decided at the trial.

In 2005, after the UMG agreement terminated, Bad Boy Records entered into a joint venture with Warner Music Group, creating the entity Bad Boy Records LLC, which continued to distribute the re-mastered *Ready to Die* albums. (R. 419, Tr. VII, 1206, 1210-15.)

II. Procedural Background

A. Proceedings in the District Court

Bridgeport and Westbound filed a Complaint in the United States District Court for the Middle District of Tennessee on February 25, 2005,[3] alleging copyright infringement under the Copyright Act, 17 U.S.C. § 101, *et seq.* (R. 1, Complaint.)

The Complaint was later amended to plead on behalf of Westbound, in the alternative, common-law copyright infringement, violation of the record-piracy laws of Tennessee, unfair competition, misappropriation and conversion. (R. 30, Third Amended Complaint.)

On February 15, 2006, the District Court dismissed Westbound's claims for federal copyright infringement, violation of Tennessee's record-piracy laws and

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[3] Certain of the claims in this lawsuit are consolidated from a lawsuit filed May 4, 2001. (R. 40, Stipulation and Agreed Order.)

conversion.[4] (R. 169, Report and Recommendation; R. 199, Order.)

This case was tried to a jury. (R. 377-79, 414-15, 418-20, 424, 477, Tr. I-IX.) In their opening statement and case-in-chief, Plaintiffs attempted to prove entitlement to punitive damages by arguing that Defendants maliciously ignored the litigation and Plaintiffs' settlement efforts, forcing Plaintiffs to trial. (R. 377, Tr. I, 31, 51, 53, 59, 60, 89.)

During Defendants' case-in-chief, however, over Defendants' objections (R. 419, Tr. VII, 1022-23; R. 420, Tr. VIII-A, 1295-97), the District Court, *sua sponte*, bifurcated the trial and precluded Defendants from countering Plaintiffs' argument and evidence introduced during the liability phase that Defendants made numerous attempts to settle with Plaintiffs. (R. 419, Tr. VII, 1175.)

On March 20, 2006, the jury found Defendants liable on all counts and awarded compensatory damages in the amount of $733,878 for each Plaintiff (R. 366, 367, Jury Verdicts), the precise amount Plaintiffs had requested.

The jury also found that Defendants' infringement was "willful" and, thus, Bridgeport was entitled to the

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[4] Westbound's sole interest here is ownership of the sound recording "Singing in the Morning." The District Court found that the sound recording was fixed in a tangible medium before February 15, 1972, and, therefore, is not entitled to federal copyright protection. (*Id.*)

maximum enhanced statutory damages under federal copyright law, $150,000, as an alternative to actual damages. (R. 366, Jury Verdict.)

The jury also found that Westbound was entitled to punitive damages. (*Id.*) The punitive-damages phase was then tried to the jury. (R. 424, Tr. IX, 1630-83.) The jury awarded punitive damages of $1,500,000 against Bad Boy Entertainment, Inc., $1,000,000 against Bad Boy Records LLC and $1,000,000 against UMG Recordings, Inc. (R. 368, Jury Verdict on Punitive Damages.)

Defendants moved for a mistrial or modification of the verdict. (R. 426-27, Motion and Memo for Mistrial or Modification of Verdict; supplemented at R. 439, Supplemental Memo in Support of Motion for Mistrial or Modification of Verdict.) The District Court denied Defendants' motion except to reduce Plaintiffs' compensatory damages by 50% each, because Bridgeport possesses an interest only in the musical composition and Westbound possesses an interest only in the sound recording.[5] (R. 461, Order.)

On September 21, 2006, the District Court entered judgment on the jury verdict and awarded damages as follows:

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[5] Thus, Westbound's contention that the Court reduced the award "due solely to the presence of another plaintiff in the action" (Petition at 2) is inaccurate.

Bridgeport:

Statutory damages	**$150,000.00**

Westbound:

Compensatory damages	$366,939.00
Prejudgment simple interest from May 4, 1998, to present at 9% per annum	$276,763.93
Punitive damages against Bad Boy Entertainment, Inc.	$1,500,000.00
Punitive damages against Bad Boy Records LLC	$1,000,000.00
Punitive damages against UMG Recordings, Inc.	$1,000,000.00
TOTAL	**$4,143,702.93**

(R. 465, Order.)

Defendants appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. (R. 467, Notice of Appeal.) Among the issues appealed was whether the jury's $3.5 million punitive-damages award was unconstitutionally excessive.

B. The Sixth Circuit Opinion

On October 17, 2007, the Sixth Circuit affirmed in part and reversed in part the District Court's decision. Significant to Westbound's Petition, the District Court reversed the District Court's punitive-damages award of $3.5 million. The Sixth Circuit held that the

punitive-damages award violates due process when measured against Defendants' conduct, the harm that Plaintiffs suffered and the comparable enhanced statutory damages that federal law permits. (Petition, Apx. 26a-35a.)

The Sixth Circuit conducted a *de novo* review of the punitive-damages award and concluded that the award was excessive in light of this Court's three guideposts under *Campbell*, 538 U.S. at 418, and *Gore*, 517 U.S. at 575: 1) the reprehensibility of Defendants' conduct, 2) the disparity between Westbound's harm and the punitive award, and 3) a comparison of the award and civil penalties in comparable cases. (Petition, Apx. 26a.)

The Sixth Circuit found that Defendants' conduct did not warrant the $3.5 million punitive-damages award. The court found present only one of the four reprehensibility factors: that the harm was the result of intentional malice or deceit. The court also found that, although the showing was not strong, the evidence that Defendants ignored pre-litigation letters and re-released the album knowing it contained an unauthorized sample supported the jury's finding that Defendants acted willfully and that their conduct was "somewhat reprehensible." (Petition, Apx. 26a-27a.)

The Sixth Circuit found that none of the other reprehensibility factors were present: First, the harm was purely economic and did not threaten the health or safety of others; second, Westbound is not a financially vulnerable victim but instead a company "that has proven its ability to protect its rights"; and third, no evidence was admitted or presented that

Defendants' infringement was one of a repeated number of actions. (Petition, Apx. 28a-29a.)

Because only one of the reprehensibility factors was present, the Sixth Circuit concluded, based on a comparison to civil awards in comparable cases, that a ratio in the range of 1:1 to 2:1 is all that due process allows in this case. (Petition, Apx. 30a-31a.) In so concluding, the court determined that the ratio of punitive damages to compensatory damages the jury awarded — 9.5:1 — was large, that the compensatory award — $366,939 — was substantial, and that the compensatory award included a punitive element by allowing recovery for lost profits. (Petition, Apx. 32a-34a.)

Finally, the court relied on the fact that the maximum damages available for willful copyright infringement under the Copyright Act is $150,000, four times the maximum amount recoverable under the Act if the infringement is not willful. The court observed that Defendants' conduct, although willful, was not highly reprehensible and that, because the size of the allowable ratio fluctuates with the amount of the compensatory-damages award, a smaller ratio was appropriate here due to the large compensatory-damages award. (Petition, Apx. 34a-35a.)

The Sixth Circuit held that a ratio of 1:1 or 2:1 is all that due process can tolerate in this case and remanded to the District Court for remittitur of the punitive-damages verdict or a new trial on such damages. (Petition, Apx. 35a.)

On February 19, 2008, the Sixth Circuit denied Westbound's petition for rehearing *en banc*. 2008 U.S. App. LEXIS 3773 (6th Cir. Feb. 19, 2008).

REASONS FOR DENYING THE WRIT

I. Westbound's Proposed Bright-Line Test Fails to Consider Important Indicia of Constitutionality Established by This Court.

Westbound seeks this Court's review to resolve a split that Westbound alleges exists among appellate courts in applying the *Gore* guideposts: those courts that presume the validity of single-digit-ratio punitive-damages awards — a presumption Westbound urges the Court to adopt here —and those courts that review each award *de novo* even if it falls within the single-digit ratio.

Westbound has manufactured a court split. In each case cited by Westbound, regardless of whether the court has reversed the punitive-damages award or left it intact, the court has applied the three *Gore* guideposts in the context of the facts of each case. In cases where the level of reprehensibility is high, the courts typically affirm larger punitive-damages awards. In cases where the level of reprehensibility is low or compensatory damages are already substantial or include a punitive element, courts typically reverse or modify such awards. The trend of these cases comports with this Court's decisions in similar cases where the *Gore* guideposts do not strongly support a punitive-damages award.

Further, Westbound's proposed presumption to treat all single-digit-ratio punitive-damages awards the same ignores this Court's precedent, just reaffirmed in *Baker*, that awards in the low-single-digit range, specifically 1:1, are more appropriate punishment of conduct with a low level of reprehensibility.

Westbound's proposal ignores not only the level of reprehensibility but also a number of other important factors this Court has instructed courts to consider in determining whether such awards are unconstitutional, such as 1) whether the compensatory-damages award itself contains a punitive component; 2) whether the compensatory damages are substantial and 3) whether the harm inflicted was physical as opposed to economic.[6]

A. Westbound Has Manufactured an Appellate-Court Split That Does Not Exist.

Courts have not ignored the "gross excessiveness" standard in favor of "strict excessiveness," as Westbound alleges. Instead, courts, like the Sixth Circuit here, determine, by applying the *Gore* guideposts, whether a particular award is ***unconstitutional***. The appropriate measure of

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[6] Westbound further argues that the jury based its punitive-damages award on Defendants' disregard of Westbound's right to deny the use of the sample, but Westbound made no such argument in support of its punitive-damages request at trial and cites to nothing in the record to support the argument here.

constitutionality is determined in reference to the *Gore* guideposts.

Westbound argues there is a "split in circuits" in how courts have applied the *Gore* guideposts and that some courts, including the Sixth Circuit in this case, have become "bogged down in determining...whether a single-digit ratio of punitive to compensatory damages should be substituted for a marginally lower single-digit ratio." (Petition at 24.) Westbound suggests that two camps have developed: 1) those courts that "have aggressively reduced single-digit punitive award ratios to a marginally smaller single-digit ratio"; and 2) those courts that "have appeared to treat single-digit ratios as presumptively valid." (Petition at 22-23.)

Westbound recites merely the outcomes of each case and not the facts that militated the result. A review of each case shows that no circuit split exists.

In each case Westbound cites, as in this case, the court applied all three of the *Gore* guideposts to the particular facts of the case, determining whether the ratio of punitive to compensatory damages was too high only as part of the overall analysis. Not surprisingly, given that reprehensibility is the most important indicia of the three guideposts, *Gore*, 517 U.S. at 575, where courts affirmed a higher punitive-to-compensatory ratio, the courts found extreme misconduct or a strong showing of reprehensibility.[7]

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[7] *See, e.g., Zhang v. American Gen. Seafoods, Inc.*, 339 F.3d 1020, 1043-44 (9th Cir. 2003) (affirming award where the harm was

On the other hand, where reprehensibility was not strong and the other factors did not support the imposition of punitive damages, a higher ratio was reversed.[8]

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intentional race discrimination); *Planned Parenthood v. American Coalition of Life Activists*, 422 F.3d 949, 958, 963 (9th Cir. 2005) (affirming award where defendant's conduct was intended to intimidate by causing fear of murder or serious bodily injury and was thus "particularly reprehensible"); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (award of just over 3 to 1 warranted given egregious nature of defendant's fraudulent conduct); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 801-02 (Wis. 2003) (affirming award where defendant's conduct was "grievous" and repeated against third parties); *Marie Deonier & Assoc. v. Paul Revere Life Ins. Co.*, 101 P.3d 742, 753 (Mont. 2004) (affirming award given "the heightened duty intrinsic and elemental to a fiduciary relationship" where insurance company was indifferent to a high probability of pecuniary loss to its agents); *Union Pacific Railroad Co. v. Barber*, 149 S.W.3d 325, 346-48 (Ark. 2004) (defendant intentionally put the traveling public in harm's way, causing death of one victim and severe injury to another); *Collins Entertainment Corp. v. Coats & Coats Rental Amusement*, 584 S.E.2d 120, 128 (S.C. Ct. App. 2003) ("degree of reprehensibility was...significant").

[8] *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 605-06 (6th Cir. 2006) (reducing ratio where only one of five factors weighed in favor of reprehensibility); *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (affirming reduction of award where the case involved economic rather than physical harm and the fraud involved only a single incident and a single victim); *Conseco v. Finance Servicing Corp.*, 381 F.3d 811, 825 (8th Cir. 2004) (reducing punitive award where compensatory award was substantial); *Harris v. Archer*, 134 S.W.3d 411, 438-39 (Tex. Ct. App. 2004) (only one of five reprehensibility factors met;

The varying results of these cases were supported by an analysis of the unique facts of each case and do not create a split on the application of the law. Instead, the results of these cases comport with this Court's holdings in *Baker* and *Campbell* applying lower ratios to cases in which the blameworthiness is relatively low.

B. This Court Has Suggested That a 1:1 Ratio Is Appropriate in Cases, Like This Case, Where the Level of Reprehensibility Is Low and Compensatory Damages Are High.

Westbound urges the Court to establish a bright-line test that would impose a presumption of validity on each punitive-damages award within a single-digit-ratio unless the award was the result of passion or prejudice or no malice is found. Because the ratio here pushes the outer limits of single-digit ratios — 9.5:1 —Westbound urges a presumption of validity for all

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defendant's isolated incident causing only economic harm not "particularly egregious"); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308-09 (Tex. 2006) (award reduced where damages for mental anguish of three times economic damages included a punitive element and only one of five reprehensibility factors met). In *Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.*, 418 F.3d 820, 837-40 (8th Cir. 2005), which Westbound cites as an example of a court getting "bogged down" in the ratios, the court actually ***affirmed*** a remitted award where the conduct was intentional and repeated and comparable civil penalties were substantial. The plaintiff did not challenge the remittitur, so the Eighth Circuit did not address the district court's reduction of the award, much less "get bogged down" in the ratios in doing so.

single-digit-ratio awards. Westbound's basis for choosing the two exceptions it did and omitting other *Gore* guideposts is equally obvious because the Sixth Circuit found in favor of Westbound on these factors.

The Sixth Circuit concluded that other factors, such as the level of reprehensibility, the size of the compensatory-damages award and the fact that it includes a punitive element, and a comparison to Congress's statutory damages for copyright infringement, precluded affirmance of Westbound's award of punitive damages.

Such indicia of unconstitutionality cannot be ignored. Indeed, treating all single-digit-ratio awards the same fails to consider the important principle that "some wrongs are more blameworthy than others." *See Gore*, 517 U.S. at 576. Given the lack of guidance and the danger of vague jury instructions, the Court established the three *Gore* guideposts for courts to consider in reviewing punitive-damages awards. *Id.* at 575.

The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 562. "This constitutional concern...arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion." *Gore*, 517 U.S. at 587 (Breyer, J., concurring). "The reason is that 'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will

subject him to punishment, but also of the severity of the penalty that a State may impose." *Campbell*, 538 U.S. at 416 (citing *Gore*, 517 U.S. at 574). Indeed, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.*

The Court has not gone so far as to impose strict numerical guidelines on courts reviewing punitive-damages awards. Until the *Baker* decision was entered on June 25, 2008, this Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula...."

> It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, we return to what we said...in *Haslip*: "'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ...properly enter[s] into the constitutional calculus.'"

Id. at 582 (internal citations omitted).

To the extent a numerical benchmark is appropriate, this Court's recent decision in *Baker* and its previous decision in *Campbell* suggest that, in cases like this case, where the level of reprehensibility is low or the case for punitive damages is relatively weak, a ratio of no more than 1:1 is appropriate.

In *Baker*, a maritime case, the Court reversed a $2.5 billion punitive-damages award against Exxon Shipping Co. for its role in the catastrophic Alaskan oil spill of 1989. The Court held that a punitive-to-compensatory ratio of 1:1 is more appropriate given that Exxon's conduct has no earmarks of exceptional blameworthiness. 2008 U.S. LEXIS 5263, at **74-80. "Under the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent." In addition, other factors, regardless of culpability, may warrant heavier or lighter punitive-damages awards. *Id.* at **39-42.

The median ratio of punitive to compensatory awards has remained less than 1:1 in the broad spectrum of cases. "The figures thus show an overall restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter." *Id.* at **46-47. Noting, however, that the real problem is the stark unpredictability of punitive awards, *id.* at **50-51, the Court endorsed a quantified approach to reviewing such awards:

> There is better evidence of an accepted limit of reasonable civil penalty...in several studies mentioned before, showing the median ratio of punitive to compensatory verdicts, reflecting what juries and judges have considered reasonable across many hundreds of punitive awards....We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases.

> These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1,...meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum...On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped.

Id. at **74-80. The Court thus held that a 1:1 ratio was a fair upper limit in such maritime cases. *Id.* at *80.

The *Baker* decision was rendered not in the context of whether the punitive-damages award violated the Due Process Clause but, instead, under the Court's function in reviewing such awards under federal maritime common law. *Id.* at **33-34, 55. Nevertheless, the Court's decision to limit punitive damages to a 1:1 ratio because the level of reprehensibility was low and because the median punitive-damages awards in all cases, not only maritime cases, is less than a 1:1 ratio, is equally applicable here.

Baker is not the first decision in which the Court has indicated that a 1:1 ratio is appropriate in cases where the justification for punitive damages is not strong. The Court did so in *Campbell:*

> [B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'...The converse is also true, however. ***When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*** The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

538 U.S. at 426 (emphasis supplied).

Thus, Westbound's proposal to treat all single-digit-ratio awards the same is not supported by this Court's precedent. Indeed, treating all single-digit-ratio awards the same has never been suggested by this Court.

Westbound states that its proposed presumption was suggested by the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993), and by Justice Breyer's concurrence in *Gore*, 517 U.S. at 586-87. While those opinions endorsed establishing a presumption of validity of

punitive-damages awards in prescribed instances, they never discussed establishing a presumption for all awards within a single-digit ratio. *Gore*, 517 U.S. at 586 (Breyer, J., concurring) ("Members of this Court have generally thought...that if 'fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.") (quoting *TXO Production Corp.*, 509 U.S. at 457). Any question that all single-digit-ratio awards should not be treated alike should be put to rest by this Court's decisions in *Campbell* and now *Baker*.

Westbound's proposal fails to consider the location of misconduct on the spectrum of blameworthiness, as well as other factors that may indicate a violation of due process, and is thus fatally flawed.

C. Westbound's Proposal Ignores Important Indicia of Unconstitutionality.

Westbound's emphasis on guarding against "outliers" and punitive damages that have "run wild" is too simplistic. While the purpose for review of punitive-damages awards is to prevent "outlier" awards, the test is whether an award does not comport with due process. The *Gore* guideposts are designed to assist courts in determining whether due process has been violated. If it has, then such damages, as here, "run wild."

Westbound's proposed presumption addresses only two of the numerous indicia of unconstitutionality this Court has articulated: 1) that such an award may be the result of passion and prejudice; and 2) that such an award may be imposed in cases where there is no

malice. Westbound's proposal fails to consider other established indicators of gross excessiveness, such as the level of reprehensibility, the size of the compensatory-damages award, whether such award already contains a punitive component, comparable civil remedies, and whether the harm inflicted is the type of conduct warranting punitive damages.

The Court in *Gore* did not create the three guideposts in a vacuum. These factors have been applied in numerous cases assessing the constitutionality of damages and are rooted firmly in precedent:

The guidepost measuring reprehensibility of the offense is based on the fundamental principles that "some wrongs are more blameworthy than others" and that "the punishment should fit the crime." *Gore*, 517 U.S. at 575-76 & n.24 (and cases cited therein). "The principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" *Id.* at n.24 (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)).

Likewise, the second guidepost, "[t]he principle that exemplary damages must bear a reasonable relationship to compensatory damages[,] has a long pedigree." *Gore*, 517 U.S. at 580 & n.32 (and cases cited therein).

Finally, as to the third guidepost, Justice O'Connor recognized before *Gore* that a reviewing court engaged in determining whether an award of punitive damages is excessive should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions

for the conduct at issue.'" *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

This Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), approved a state-court review procedure similar to the *Gore* test, which "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages," suggesting, however, that state schemes that would only set aside or modify awards that were "manifestly and grossly excessive" or "evince[] passion, bias and prejudice on the part of the jury so as to shock the conscience," would not pass muster. *Id.* at 21-22.

Westbound advocates for precisely the extreme test rejected by this Court, stating:

> *De novo* review allows an appellate court to review a district court's determination anew, but it does not permit an appellate court to serve as a junior varsity jury — ***unless that jury's verdict is "run wild" and is so excessive as to strongly suggest bias, passion, or prejudice.***

(Petition at 34) (emphasis supplied). Like the rejected review procedures in *Haslip*, Westbound's proposal fails to consider other indicia of unconstitutional excess and thus should not be considered.

II. The Sixth Circuit Correctly Applied a *De Novo* Standard of Review.

Westbound argues that the Sixth Circuit erred by reviewing, *de novo*, whether the jury's findings supported the *Gore* guideposts, and, particularly, the reprehensibility factors. Westbound states that the Sixth Circuit should have reviewed such findings for clear error. Westbound then attempts to paint this issue as a broad concern afflicting appellate courts generally and warranting clarification by this Court, but Westbound cites no cases in support of this proposition.

As a threshold matter, the jury in the instant case did not make specific findings of the reprehensibility factors. The *Gore* guideposts were developed for purposes of application by ***courts*** in reviewing jury punitive-damages verdicts. *Gore*, 517 U.S. at 574-75; *Campbell*, 538 U.S. at 418. The jury made only one finding as to punitive damages: that punitive damages of $3.5 million should be awarded against Defendants.

The Sixth Circuit properly followed the holding of this Court in *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001), and applied a *de novo* standard of review to the question of whether punitive damages were unconstitutionally excessive. The Sixth Circuit analyzed each *Gore* guidepost assuming Westbound's — not Defendants' — version of the facts.

This Court in *Cooper Industries, Inc.* held that, "in passing on district courts' determinations of the constitutionality of punitive damages awards," the

reviewing court must apply a *de novo* standard of review. *Id.* at 436. The reason, the Court explained, is that punitive damages are not, like compensatory damages, intended to address the concrete loss the plaintiff has suffered by reason of the defendant's wrongful conduct, but, instead, operate as private fines intended to punish the defendant and to deter future wrongdoing. *Id.* at 432. Thus, "[a] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." *Id.*

Further, the precise meaning of such concepts as gross excessiveness cannot be articulated with precision and are "'fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.'" *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). In addition, the general criteria set forth in *Gore* will acquire more meaningful content through case-by-case application at the appellate level. *Id.* "[*D*]*e novo* review tends to 'unify precedent' and 'stabilize the law.'" *Id.* (quoting *Ornelas*, 517 U.S. at 697-98):

> Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself.

Ornelas, 517 U.S. at 587.

Only the factual findings made in conducting the excessiveness inquiry must be accepted unless clearly erroneous. *Cooper Industries, Inc.*, 532 U.S. at 435. "Unlike the measure of actual damages suffered, which presents a question of historical or predicative fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 437 (citations omitted). Thus, the reviewing court's consideration of each of the *Gore* guideposts must be made on a *de novo* basis.[9] *Id.* at 440.

The Sixth Circuit considered whether Defendants acted with intentional malice or deceit based on Westbound's view of the facts: that Defendants ignored pre-litigation letters and re-released the album knowing it contained an unauthorized sample. The Sixth Circuit, assuming this evidence to be accurate, determined that such conduct was "somewhat reprehensible." Likewise, the Sixth Circuit did not "second guess" the jury on the issues of financial vulnerability and repeated conduct, as Westbound contends, but instead considered Westbound's arguments in the context of Westbound's version of the

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[9] The Court noted that differences in the institutional competence of trial judges and appellate judges are consistent with its conclusion, as, only with respect to the first *Gore* guidepost, reprehensibility, do district courts have a "somewhat superior vantage" over appellate courts, "and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor." The Court added that trial and appellate courts seem equally capable of analyzing the second factor — the ratio — and that appellate courts seem more suited to the third guidepost — comparable civil penalties — which calls for a broad legal comparison. *Id.*

facts, finding Westbound's evidence insufficient to make its case.

III. This Case Is Not the Appropriate Vehicle to Change Settled Law.

This case is not the appropriate vehicle for this Court to revisit appellate review of punitive-damages awards. Here, the punitive-damages award was grossly excessive under the circumstances, and the Sixth Circuit's determination that a 2:1 or 1:1 ratio is more appropriate comports with this Court's decisions in *Gore*, *Campbell* and *Baker*.

Applying the appropriate standard of review, the Sixth Circuit correctly applied the *Gore* factors.

A. Reprehensibility.

This Court set forth the standard for reprehensibility in *Campbell*:

> Reprehensibility is determined based on consideration of whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

538 U.S. at 419. "The weighing of only one of these factors in favor of plaintiff may not be sufficient, and

the absence of any factor weighing in favor of plaintiff 'renders any award suspect.'" *Id.*

The Sixth Circuit found present only one of the four reprehensibility factors — that the harm was the result of intentional malice or deceit — and the court determined that even the showing of that factor was not strong. The court did not make new findings of fact, as Westbound alleges, but instead assumed the jury believed Westbound's version of the facts. The court concluded that, based on this evidence, Defendants' conduct was "somewhat reprehensible." (Petition, Apx. 26a-27a.)

The Sixth Circuit also correctly found that the other reprehensibility factors were not present. Westbound does not contest that the harm in this case was purely economic and did not threaten the health or safety of others. (Petition, Apx. 28a.)

The court determined that Westbound is not a financially vulnerable victim but rather a company "that has proven its ability to protect its rights." Again, the court considered Westbound's asserted factual evidence: 1) that it is a small company that depends almost entirely on income from sampling, 2) that Defendants used Westbound's sample instead of a sample of Jimi Hendrix's "Power of Love," for which Defendants could not get clearance, and 3) that Defendants have "financial clout" and "strength in the music industry worldwide." The court rejected not the facts themselves but Westbound's argument that they support a finding that Westbound is a financially vulnerable victim. (Petition, Apx. 28a) (citing *Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th Cir. 2006)).

As to the fourth reprehensibility factor, the Sixth Circuit found no evidence that Defendants' infringement was one of a repeated number of actions. Again, the Sixth Circuit did not disregard any factual findings of the jury in reaching this conclusion; instead, the court found a ***lack*** of evidence supporting Westbound's argument that Defendants' conduct was repeated.

The court assumed Westbound's factual evidence to be true but determined it was not sufficient to establish infringements by Defendants against various different parties rather than within the single transaction with Westbound.

Westbound never alleged more than one act of infringement. Indeed, its sister company, Bridgeport, on the same set of facts, sought and recovered $150,000, the maximum amount of statutory damages for a single act of infringement: the taking of the sample without a license.

Punitive damages are designed to punish actionable conduct. If Westbound believed Defendants' conduct during the litigation was actionable, Westbound had a separate vehicle to pursue such remedies.[10] (Petition, Apx. 29a.)

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[10] Westbound further argues that a split among the appellate courts exists in applying the "repeated conduct" prong of the reprehensibility guidepost. This Court, however, made clear in *Williams*, 549 U.S. 346; 127 S. Ct. at 1065, that harm to others is the appropriate test: "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was

B. Disparity between Compensatory and Punitive Damages.

The Sixth Circuit followed this Court's precedent in considering the punitive-to-compensatory ratio here.

The Sixth Circuit determined that the compensatory-damages award — $366,939 — is large and supports a ratio of only 1:1 or 2:1.[11] The Sixth Circuit also emphasized that the compensatory-damages award included a punitive element, as Westbound was awarded both actual damages and Defendants' profits.[12] (Petition, Apx. 32a-34a.)

The Sixth Circuit's decision, again, comports with this Court's decision in *Campbell*, where the Court observed that a 1:1 ratio is appropriate when compensatory damages are high and reversed a punitive-damages award where the compensatory

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particularly reprehensible...." Westbound failed to provide evidence that Defendants repeated the actionable conduct here: copyright infringement.

[11] The Sixth Circuit appropriately compared this case to other cases in which the harm was more egregious but the ratio was smaller. (*See* Petition, Apx. 32a-33a.)

[12] The purpose of allowing copyright plaintiffs to recover the defendants' profits is to prevent the infringer from unfairly benefitting from a wrongful act. (Petition, Apx. 33a) (citing *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 103 (2d Cir. 1999) (quoting H.R. Rep. No. 94-1476, at 161 (1976), *reprinted in* 17 U.S.C.A. 504 at 146 (West 1996)).

damages were not only high but included a punitive component. 538 U.S. at 426.[13]

Moreover, as the Sixth Circuit observed, when Westbound's ***actual*** damages, which do not include its lost profits, are compared to punitive damages, "the ratio of the punitive damages award and the non-punitive element of the compensatory damages award is very high."[14]

C. Comparable Civil Penalties.

Westbound does not address the third guidepost: comparable civil remedies for the tortious conduct at issue. This Court has observed that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris Industries of Vt., Inc.*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part)).

Indeed, the third guidepost is particularly significant here, as the Sixth Circuit recognized, because Congress has set the maximum amount of statutory damages allowable for willful copyright

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[13] The Sixth Circuit rejected Westbound's argument that the ratio should be measured based on the entire amount of compensatory damages awarded to both Plaintiffs — $366,939 x 2, plus interest of $276,763.93. (Petition, Apx. 33a-34a.)

[14] Westbound's lost licensing fees were $43,478 without interest and $51,946 with interest, equaling a ratio of just over 100:1.

infringement at $150,000. 17 U.S.C. § 504(c)(2). Given Defendants' conduct was not highly reprehensible in this case and compensatory damages are substantial, the Sixth Circuit's maximum ratio of 2:1 or 1:1 here is appropriate.

CONCLUSION

This case presents nothing more than a garden-variety claim of willful copyright infringement, entitling Westbound to seek punitive damages only because of a statutory exception for pre-1972 sound recordings.[15] The Sixth Circuit has not outright rejected punitive damages here but has limited the award to a ratio of 1:1 or 2:1. The range of punitive damages allowed by the Sixth Circuit in this case far exceeds the Congressional limits for the punishment of infringing conduct and comports with the precedent of this Court.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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[15] *See* 17 U.S.C. § 301(c). This exception will be eliminated on February 15, 2067, when the preemptive provisions of the Copyright Act shall apply. *Id.*

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